

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1465

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

against

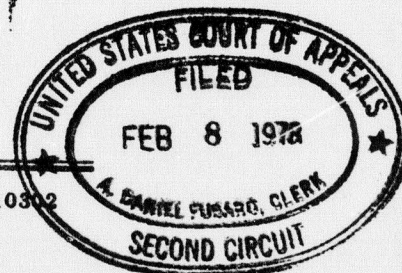
LUIS NUNEZ RAMOS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
LUIS NUNEZ RAMOS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,
Appellee,

-v-

LUIS NUNEZ RAMOS,
Defendant-Appellant.

-----X

BRIEF ON BEHALF OF DEFENDANT-APPELLANT LUIS NUNEZ RAMOS

STATEMENT

The defendant-appellant, Luis Nunez Ramos, was indicted and charged with the commission of the crimes of conspiring to and substantively violating the federal narcotic laws.

He, together with eight others, proceeded to trial before Hon. Vincent L. Broderick and a jury in the United States District Court for the Southern District of New York.

The appellant was found guilty as charged and on September 19, 1972, was sentenced to concurrent fifteen (15) year terms of imprisonment. This in turn was to run concurrently as of the date of the writ ad prosequendum, with the five (5) year sentence which the appellant was serving as a result of a conviction in Puerto Rico.

Added to the foregoing was a special parole term of six (6) years.

The instant appeal is from the aforesaid judgment of conviction.

The writer was assigned to represent the appellant in the District Court, and the assignment has been continued by this Court.

STATUTES INVOLVED

Page

TITLE 21, UNITED STATES CODE, Section 841

Prohibited acts A - Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of

not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Section 951. Definitions.

(a) For purposes of this subchapter --

(1) The term "import" means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States).

(2) The term "customs territory of the United States" has the meaning assigned to such term by general headnote 2 to the Tariff Schedules of the United States.

(b) Each term defined in section 802 of this title shall have the same meaning for purposes of this subchapter as such term has for purposes of subchapter 1 of this chapter.

Section 952. Importation of controlled substances -- Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions.

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that . .

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States ---

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance --

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Pub. L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285.

Section 960. Prohibited Acts A - Unlawful acts

(a) any person who --

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

(b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than \$25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than \$15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special

parole term of not less than one year if such controlled substance is in schedule IV.

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

Pub. L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290.

STATEMENT OF FACTS

The proof as adduced by the Government in support of the indictment, as directly¹ applicable to the appellant, can be synthesized in the following narration.

Raymond Rivera, a co-conspirator testifying on behalf of the Government, related that after he had interposed a guilty plea to two counts of possession of narcotics (T 203)² he decided to cooperate with the Government (T 204).

He stated that when in Puerto Rico William Cortes-Rios, another co-conspirator, invited him to join in the distribution of narcotics. Rivera accepted and thereupon was introduced to and began to work for Fernando Gallardo.

Rivera testified that he and Cortes-Rios then went to Los Angeles where the latter purchased eleven, nine (9) ounce packets of a brown and grainy heroin. Cortes-Rios then returned to New York, where the heroin was distributed.

Rivera thereafter made a second trip to Los Angeles, purchased 14 packets of heroin, transported it to and distributed it in New York. He claimed to have sold two packets to the appellant at twelve thousand (\$12,000.00) dollars a packet (T 301-02).

-
1. A more detailed narration of the entire prosecution is set forth in a joint brief submitted by co-appellants.
 2. The prefix "T" refers to the trial transcript.

Rivera stated that he made a third trip to Los Angeles where he purchased sixteen packages of heroin, transported and distributed it in New York City. He again allegedly sold the appellant two packages (T 344).

Rivera then narrated a fourth trip to Los Angeles where he purchased ten packages of heroin on behalf of the co-appellant Carlos Rivera Santiago. The delivery thereof was made in the appellant's social club but not in his presence (T 355).

However, the appellant subsequently did arrive, whereupon a discussion was had between him, Carlos Santiago, the defendant Jose Luis Iglesias, a/k/a Chequi, and Rivera as to distribution (T 357).

Rivera then left for Puerto Rico, where he was contacted by Carlos Santiago who complained of distribution difficulties. On his return he met the appellant and Santiago (T 365), who independently distributed the heroin and thereafter gave him twenty-five thousand (\$25,000.00) dollars.

Rivera then testified as to a fifth trip to California where he purchased thirty-five packages of heroin and sold it to, amongst others, the appellant.

On cross-examination Rivera admitted making \$75,000.00 selling narcotics. That he had not paid any income tax

thereof (T 491), nor been contacted by the Internal Revenue Service (T 532), that he didn't anticipate being prosecuted for any of the trips to California (T 493), for the peddling of narcotics in New York (T 493), for cashing and keeping the proceeds of a stolen check (T 535), and using heroin and cocaine (T 535).

Maria M. Sosa, a bank clerk, testified as to fiscal transactions with William Cortes-Rios.

Louis Rodriguez, a co-defendant, testified as to narcotic dealings with Raymond Rivera and Iglesias.

Police Officer Burbage testified as to the circumstances surrounding the execution of a search warrant on the apartment of a co-defendant, Francisco Machado, as well as that of Felix Machado, and the arrest of Fernando Gallardo.

Ricardo Garcia testified as to the purchase of heroin from Iglesias.

Raymond Rossy, an undicted co-conspirator, testified as to his narcotic dealings with Gallardo. He conceded that he had lied before the Grand Jury in order to protect his brother-in-law. Moreover that even after he had decided to cooperate, he did not reveal that his father was holding a considerable amount of narcotics for him in Puerto Rico (T 1305), as well as \$116,000.00 (T 1306). However, he did

not anticipate being charged with tax evasion or various narcotic offenses (T 1409-10).

Detective Jose Luis Guzman of the New York City Police Department testified as to undercover narcotic dealings with Moises Maldonado, Benito Cruz and Raymond Rossey.

Raymond Valentine related his criminal record which included assaulting a police officer (T 1826), possession of weapons (T 1827), and conspiring to distribute narcotics (T 1829). He admitted that he was then serving a federal prison term for the aforesaid conspiracy and anticipated that the prosecutor would apprise the Parole Board of his testimony (T 1831).

The witness related his narcotic dealings with Raymond Rossey (T 1832), Anthony Rodriguez (T 1837), and Fernando Gallardo (T 1848).

Raymond Vallely, a New York City detective, testified as to his arrest and search of Jose Luis Iglesias (T 1944) and Anthony Rodriguez (T 1947).

Robert E. Raggett, also a New York City detective, testified as to the arrest and search of Cuba as well as the execution of a search warrant on the apartment of Antonio Morales.

Kenneth Robinson, another New York City police officer, testified as to the circumstances surrounding the execution of a search warrant on the premises of co-appellant Antonio Morales.

Benito Cruz, an unindicted co-conspirator, twice convicted felon, and narcotics seller under two sentences of imprisonment from one year to life, testified as a perjured cooperating prosecutorial witness. He related that he had narcotic dealings with the co-defendant, Anthony Rodriguez, and a partnership arrangement with Fernando Gallardo. He stated that he had made four trips to Los Angeles to buy heroin, and that Orlando Machado subsequently became his partner.

Cruz testified that he had met the appellant at his social club. Additionally that the latter would receive and relay messages to Willie Rios, from whom he purchased heroin.

The witness related that in December, 1974 the appellant gave a paper bag to Gallardo and told the latter that it contained \$25,000.00. Moreover, that he was present when Gallardo opened the bag and counted the aforesaid \$25,000.00 (T. 2010-11). Thereafter, i.e., in January, 1975, he began to distribute heroin for Gallardo.

Cruz thereafter testified as to a meeting in August, 1974 with the co-appellant Jose Velasquez and Fernando Gallardo, at which time Jose Rivera and others was present. The witness thereupon related that

while Rivera was in custody on a state narcotics violation, he, Cruz, while attending the court proceedings, was given the name of "an informant against Rivera, and several other individuals" (T 2095) by Rivera's attorney, one Carl Bernstein. Objection was immediately taken and sustained. Undaunted the prosecutor inquired as to the time, place and purpose of the meeting. The latter response was "what to do with the informant" (T 2095).

A side bar conference was thereupon held at which time objection was specifically taken as to the introduction of any discussion as to the killing of an informant (T 2095). Pointedly, it was argued that it was beyond the scope of the charged conspiracy. The Court thereupon responded:

" Is there any question that there was a conspiracy to distribute heroin and if there is some threat to the conspiracy by the police, that a conversation having to do with the elimination of an informant who has worked with the police is in furtherance of the conspiracy?"
(T 2096)

The response thereto was that any reference to killing an informant was beyond the scope of the indictment. Moreover, that there was no evidence to support the progression that because one engaged in illegal activity,

he would go to the extreme of killing another who might reveal its existence. Doubly so when a lawyer was charged as a participant.

Moreover, the indictment did not set forth as an objective of the conspiracy, that in order to further the same, the co-conspirators would eliminate any individual who might disclose its existence (T 2098).

It was submitted that by telling the jury that a lawyer was involved, albeit he not be at the defense table, there would be such revulsion as to vitiate the normal perimeters of an adversarial controversy. For any prosecutor to infer that lawyer and client are one, particularly when an attorney reveals information as to the disclosure of an informant, and then think that a jury would pay heed to the words of defense counsel is simply to defy reality (T 2099).

It was further argued that aside from the patent prejudice the disclosure was lacking in probative value (T 2099).

The Court held that the evidence was both relevant and prejudicial (T 2103). It proposed that the prejudice be handled by an admonition to the jury that there was neither an allegation, nor indeed any evidence, that any

defendant on trial participated in any threats to the informant or to anyone else.

Objection was taken thereto, pivotally on the basis that this was the second occasion that the Court apprised the jury that none of the appellants had anything to do with the threats ³ (T 2104).

The Court nonetheless held that it would be admitted.

In the event not only was it admitted (T 2108), but evidence was even introduced, that one of the defendants would not pay the fee due the informant's lawyer (T 2108), and that the informant was given \$2,500.00 to disappear.

The Court thereupon instructed the jury that:

" There is no evidence, no allegation, that any defendant in this case made any threats or took any action or participated in the taking of any action with respect to the informant, and this evidence is introduced in connection with the conspiracy, but no defendant in this case is charged with making any threats or any suggestions with respect to taking care of any informant". (T 2109)

Cruz related that he was with Fernando Gallardo in December, 1974, initially when the appellant gave Gallardo a paper bag containing \$25,000.00 (T 2110), and subsequently

3. The initial admonition was that none of the defendants had anything to do with threats to the witness Rivera.

with the other defendants.

Orus further stated that on four occasions he sold a half a kilogram of heroin to the appellant at \$25,000.00 per half kilogram (T 2173).

On cross-examination he acknowledged that he had been convicted of attempted robbery (T 2226), was a fence (T 2227), a narcotics dealer (T 2230), a cocaine user (T 2230), a numbers controller whose operation resulted in between fifty and one hundred thousand dollars per week passing through his hands (T 2231-32), and who acknowledged making a profit of "maybe a hundred thousand" (T 2252) from the sale of narcotics, sold counterfeit draft cards (T 2285), birth certificates (T 2288), driver's license (T 2291), voters registration (T 2296), admitted to having committed over one hundred (100) crimes (T 2336).

The testimony of New York City police officers Juan A. Roman, Raphael Rivera, Raymond Vallely, and Richard Cerrato made no mention of the appellant.

The appellant did not testify nor did he call any witnesses on his behalf.

Motions for a judgment of acquittal under Rules 29(a) and (b) were timely presented and denied.

Summations were made, the jury was instructed, and returned a verdict finding all the appellants guilty as charged.

POINT ONE

THE PROSECUTORIAL SUMMATION WAS UNFAIR

The rebuttal summation of the Assistant United States Attorney was in no way precipitated by or resultant from adversarial stress generated by the instant appellant. It was not simple prosecutorial exuberance. It did, however, generate into subjective argument, bound neither by fair comment or permissive inferences to be reasonably drawn from the record.

During the course of the prosecutorial rebuttal summation, the Assistant United States Attorney said:

" But perhaps more fundamental to the charge that the government in this case has put the suggestion into the government's witnesses whom they should testify against, that somehow an agent of the federal government has decided that he will try and obtain the conviction of innocent people by putting the names of innocent people into the mouths of government witnesses, if you think that I, if you think that Mr. Ziegler or any other federal agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing, then take about 30 seconds in your deliberations; if you think that is what happened here, come back in 30 seconds and acquit every one of them; if that is what this case is about and you think that is what this case is about, you have no business taking any more time than 30 seconds." (T 3391)

The minimum standards promulgated by the American Bar Association Project on Standards for Criminal Justice, relating to the Prosecution Function provide that:

- " 5.8 Argument to the jury.
 - (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
 - (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
 - (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."
- (P. 126)

The same standards as to the Function of the Trial Judge provide:

- " 5.10 Final Argument to the jury.

The trial judge should not permit counsel during the closing argument to the jury to:

 - (i) express his personal opinions as to the truth or falsity of any testimony or evidence or the guilt or innocence of the defendant,
 - (ii) make arguments on the basis of the matters outside the record, unless they are matters of common public knowledge or of which the court may take judicial notice, or
 - (iii) make arguments calculated to inflame the passions or prejudices of the jury."

It need not be stressed that the foregoing are only minimal.

A prosecutorial averment of personal belief as to a defendant's guilt is improper. Its impropriety is self-evident since the justice of a cause is not determined simply by its champion.

A prosecutor may neither express his personal belief in the testimony of his witnesses nor be the surrogate of his cause. Yet that is precisely what was done in the instant inflammatory and prejudicial summation.

United States v. Hestie, 439 F.2d 131 (2nd Cir. 1971);
United States v. Grumberger, 431 F.2d 1062 (2nd Cir. 1970);
United States v. Murphy, 374 F.2d 651, 655 (2nd Cir. 1967);
United States v. White, 324 F.2d 814, 816 (2nd Cir. 1963);
United States v. Spangelet, 258 F.2d 338, 342 (2nd Cir. 1958).

The duty of a prosecutor is to argue on the basis of, and in furtherance of, any reasonable inference that may be drawn from the evidence. He is always a quasi-judicial officer, presumed to be and indeed duty-bound to act impartially in the interest of justice. In the event that he fails to so act, it is the duty of the trial judge to see that he does so. In this cause the prosecutor exceeded the bounds of his office. The court did naught to effectively eradicate the harm that he had wrought.

The issues at bar centered as to the credibility of the government witnesses. Residually the appellant was deprived of his right to be dispassionately tried solely on the basis of the evidence.

The prosecutor's remarks epitomized the foreboding expressed by this Court in United States v. Arredondo-Sarmiento, 545 F.2d 785 (2nd Cir. 1976) at 793, that:

" It is not at all unusual that, during the course of a lengthy multi-defendant trial, statements are made by counsel which would not be selected as models for a manual on trial procedure."

The instant remarks were objected to and constituted the basis of an application for the withdrawal of a juror and the declaration of a mistrial (T 3424), as well as a severance under Rule 14 of the Federal Rules of Criminal Procedure (T 3446).

They were not the "relatively subdued comments in reply" that this Court sanctioned in United States v. Tramunti, 513 F.2d 1087 at 1119 (2nd Cir. 1975). To the contrary, this was an attempt to have a far more attractive group, i.e., young prosecutors, evaluated by a jury rather than the testimony of those who had testified on behalf of the Government. Such is not the purpose of trial by jury.

In essence, by having the jury consider the prestige and propriety of the young assistant United States Attorneys the prosecution brought about by indirection what it is precluded to do by direction. United States v. Pace, 436 F.2d 761, 763 (2nd Cir. 1971).

The Government declined that it was vouching for the credibility of its witnesses (T 3443).

The Court, however, observed at T 3443:

" It does seem to me it came across to some extent that you were doing just that."

and at T 3444:

" There was a question about jeopardizing of reputations, which it seems to me -- I don't recall whether you included yourself in those whose reputations might be jeopardized, but if it wasn't -- if you did not include yourself it was still putting the whole credibility of the United States Government behind these witnesses."

Irrespective of its concern, the Court denied the appellant's motions (T 3444, 3469), as to which error is ascribed.

The writer never suggested any prosecutorial impropriety. Contra, United States v. Stassi, 544 F.2d 579 (1976); United States v. Santana, 485 F.2d 365 (1973). He unlike some other trial counsel, never complimented ⁴ or criticized either

4. E.g. T. 3271

of the assistant United States Attorneys.

As counsel assigned to an indigent, he endeavored to the best of his ability to represent only the appellant. He in no fashion engaged in subjective squabbles. Yet the prosecutor created straw men. Then portrayed himself as an incarnate Billy Budd, and endeavored to have the jury adjudicate his integrity "beyond a reasonable doubt", rather than that of the government witnesses.

Such conduct was simply not fair. It was indeed of such a character that it would be illusory to think that the judge's charge and the jury's good sense could be counted on to set things right. Contra, United States v. Santana, supra, at 371.

POINT TWO

THE APPELLANT ADOPTS THE ARGUMENTS SET FORTH BY
HIS CO-APPELLANTS.

CONCLUSION

The judgment of conviction should be reversed
and a new trial ordered.

Respectfully submitted,

THEODORE KRIEGER
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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of Feb., 1978 at No. 1 St. Andrews Pl., NYC

deponent served the within
upon

Brief
U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this

9 day of Feb. 1978

[Signature]
Edward Bailey

[Signature]
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

